(1) OPINIONS, JUDGMENTS AND ORDERS OF THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS

[A] Report of the Special Master Dated March 15, 1971 in the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION
FILE NO. 2073

ERICKSON'S, INC.,

Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant.

To the Honorable United States District Court
For the Southern District of Georgia

The report of PERRY BRANNEN, SPECIAL MASTER, to whom this cause stands referred for the purpose of taking and hearing evidence offered by the respective parties, and to make his findings and conclusions on all issues presented and to recommend the judgment to be entered thereon, and making this his report to the Court separately, stating his findings of facts and conclusions with all the evidence introduced before him, pursuant to Order of Court dated May 6, 1969.

Having heard the evidence in the presence of the parties and their counsel, my findings of facts as to each separate count of the Complaint is as follows:

COUNT ONE

At the beginning of the taking of evidence, the counsel for Defendant stated:

> "We're willing to agree to the following, subject to any claim for interest and subject to any back charge

that we may have for any reason, a contract price of $684,400.00 lump sum contract price; add to that sum $7,743.84 representing change orders One through Seventeen (Peacock's) they not being in dispute for a total of $692,143.84—less cash payments made by Peacock to Erickson in the sum of $79,592.39, and from that figure will have to be taken, plus or minus, depending upon other claims that they present, or set offs, back charges, that the Defendant presents."

The Master finds as a matter of fact that the sum sued for in Count One in the amount of $71,823.55, plus Change Orders One through Seventeen (Peacock's) in the amount of $7,743.84 equal the sum admitted to be due by Defendant. Therefore, the amount of $71,848.55 claimed in Count One is included in the admitted sum, and Judgment is recommended for Plaintiff for this sum plus interest from the 11th day of December, 1966, at the rate of Seven (7%) per cent.

Count Two

Count Two seeks to recover $9,808.15 for additional labor and additional materials on the project referred to in the Complaint under certain change orders.

It appears that the change order numbers of the parties are not the same. Peacock admits his change orders One through Seventeen are payable in the amount of $7,743.84. These numbered change orders compared to Erickson's change order numbers leaves for determination Erickson's change orders 11, 13, 15, 23, 38 and 42, which are not included in Peacock's change orders One through Seventeen.

Change Orders 11, 13, 15, 23 and 38 should be denied since there is no evidence to show any of them were made within one week as provided in the contract between Peacock and Erickson's. (Section 5-C of the contract).

The Change Order 42 was authorized by the architect and the authorization was transmitted by Peacock to Erickson.

Therefore, work done by Erickson's on this change order was authorized work and the amount of $1,382.37 was proven to be a reasonable charge for the work done. This sum plus the sum of $7,743.84 equals $9,126.21 which is the total amount found by the Special Master to be due and owing by Peacock to Erickson on Count Two, and Judgment is recommended for this sum plus interest on the sum of $7,743.84 from the 11th day of December, 1966, at Seven (7%) per cent, and interest on the sum of $1,382.37 from the 11th day of December, 1966, at Seven (7%) per cent.

COUNT THREE

In Count Three, Erickson contends that he should collect for the installation of sleeves and inserts. Erickson by his contract agreed that the materials to be furnished and work to be done by Erickson are all plumbing and heating and air conditioning described in Section 58, Plumbing, and Section 59, Heating and Air Conditioning, of project specifications and as shown on applicable drawings. Sections 58 and 59 require sleeves and inserts. The contention of Erickson that he was only to mark where the installation would be is not in the opinion of the Special Master a tenable position. This type of work is done by plumbers and the evidence would further show that if the sleeves and inserts were not properly placed the result would be disastrous. Further the evidence shows that Erickson made complaint, did not want to do the work and was advised to exercise his right to arbitrate as provided by the contract, which he did no do, and thereafter made claim with knowledge that Peacock was insisting that the work be done as the obligation of Erickson under the contract.

The preponderance of the evidence is that it is customary for sleeves and inserts to be installed by the plumbing and heating and air conditioning sub-contractors.

Further the claim of Erickson was not filed with Peacock within seven days from the completion of the work. It ap-

pears from P-18 that the last claim for labor was for the week ending January 16, 1966 and that on July 22, 1966 Erickson sent to Peacock a statement designated Change Order Number 3 Amendment No. 1 showing the sum of $10,577.02. It is further the opinion of the Special Master that for the above reasons and all of the evidence that Count Three should be denied and it is so recommended.

Count Four

Count Four seeks to recover the sum of $4,602.68 as the wages of Erickson's Foreman from the week ending January 9, 1966 through the week ending May 29, 1966. This claim was sent to Peacock on August 31, 1966 by letter with attachment showing the hours each week at $4.60 per hour.

There are a number of reasons why this count should be denied. First it is apparent that the claim for the extra was not sent to Erickson (sic) within seven days from the last labor charged, that being for the week ending May 29, 1966, and the letter being dated August 31, 1966. Secondly the contract between Erickson and Peacock does not specify a completion date and the contract was extended to September 5, 1966. Further it appears that Erickson's contention is that he kept Davis in Brunswick with nothing to do. This, he contends, was done solely to check work previously finished by Erickson. There is no evidence to show why he was not kept there from the week of May 29, 1966 to the completion date as extended to September 5, 1966.

It is recommended that Judgment be entered against the Plaintiff on Count Four.

Count Five

This count seeks interest for late payment by Peacock under the contract which provides that Peacock will remit to Erickson within five days after the receipt of the funds from the owner. The record shows that the first receipt by

Erickson was dated December 23, 1963 and that requests were periodically made until March 24, 1966, and that although payment was not made to Erickson within the five days, nevertheless there was no demand for this interest until April 8, 1970, when Plaintiff filed its Amendment adding Count Five.

The evidence shows that Erickson received the first remittance on February 10, 1964 and the last on June 18, 1966. There is no evidence that during said period there was any contention that the payment made by Peacock was not in full or that the payment was not in full of the request.

It is argued that Erickson did not know that Peacock was withholding funds beyond the five-day period until he (Erickson) had occasion to examine the Certificates placed as evidence in this Court. (During the hearing before the Master.) There is no evidence of fraud or the discovery of the fraud, and the evidence fails to show any diligence on the part of the Plaintiff to discover the alleged breach. It further appears that the last request of Erickson was dated March 24, 1966, more than four years before the filing of Count Five. Generally speaking, each party was required by the contract to make claim within seven days.

Further, the contract between Erickson and Peacock did not provide for the payment of interest, and the payment of the principal sums, having been paid relating to Count Five and accepted by Erickson, amounts to any is, a waiver of the right to claim interest. Therefore, Judgment is recommended for Defendant.

Counter Claims

All of the evidence shows that Erickson had no employee on the job after May 29, 1966. The original Complaint was filed on the 16th day of December, 1966, Answer was filed to the Complaint but no Counter Claim was set out in the Answer. The counter claims of Peacock are first brought

into the case when amendment was filed with the Special Master on the 28th day of April, 1970. All of the Counter Claims arose out of the contract between Erickson and Peacock and at the time of the filing of the amendment more than four years had passed. No case has been cited on limitation, but since Peacock could not have maintained a Complaint on the Cross Claims, I am of the opinion that the best rule would be to hold the Counter-claims barred.

Further discussing them separately, the evidence to support each is vague, indefinite and partially speculative. With reference to "well points" $51.20, there was little evidence there was no actual proof by competent evidence and certainly not enough evidence to sufficiently carry the burden of proof.

Further the claim of $376.95 for laying boiler foundation. This foundation is concrete, was done by non-plumbing trades, and under Section 8 of the general contract the Contractor was to furnish all labor and materials for installing concrete work shown on the drawings or called for in the specifications. While Erickson wrote a letter requesting Peacock to construct the boiler foundation, he did in the same letter deny his responsibility to do the work. This work had to be done and the Special Master is of the opinion from the evidence that this claim should be and is denied.

The claim for electricity is a claim not made prior to amendments and the evidence to support it is vague, indefinite and speculative in that there were no meter charges. The attempt to prove was based on pro-ration without any actual evidence to show the type of equipment using electricity, the hours such equipment was used, how much electricity the various kinds of machinery would use per hour, and all in all, there was no substantial evidence to prove the claim which would have to be based on the amount of electricity used. Erickson paid for electricity billed to him and had no knowledge that any additional claim would be made.

The claim for damages for acoustical tile in the amount of $108.00 was for eplacing 54 tiles which were allegedly stained by reason of water damage caused by leaks. The tile was not a part of his contractual work and his liability, if any, would necessarily be based upon his failure to properly do his required work.

The Special Master having found for the Plaintiff and against the Defendant is of the opinion that costs of court and fee of Special Master as fixed by the Court be paid by Defendant and that the costs of the Court Reporter be paid share and share alike by the parties.

This 15th day of March, 1971.

Respectfully submitted,

PERRY BRANNEN
Special Master

[B] Memorandum and Order of Judge Thomas J. Clary of the District Court Dated April 28, 1971 and Entered on May 3, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION
FILE NO. 2073

ERICKSON'S, INC.,
Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant.

MEMORANDUM AND ORDER

This matter is now before the Court on defendant's motion for modification of the Special Master's Report. The de-

fendant specifically objects to the Master's allowances for prejudgment interest, and his assignment of costs to the defendant.

On the matter of costs of court and the fee of the Special Master, it is the opinion of this Court that the Special Master was in error.

Judge Scarlett had directed that such costs should be apportioned by the Master in accordance with his findings of fact as to Counts II, III and IV. As the plaintiff only prevailed in one of said counts, it is, therefore, not entitled, under Judge Scarlett's express directions, to be free of the aforementioned costs. The Court is, therefore, of the opinion that the costs of court and the fee of the Special Master should be shared by the parties.

The question of interest presents a more difficult issue. The defendant herein alleges that at all times up to the time of judgment the amount owed by them was unliquidated. They further contend that all five counts of plaintiff's complaint constituted a single claim.

It is clear that the Circuit Court in its earlier opinion on this case did not resolve the issue. See *Travelers Indemnity Co.* v. *Erickson's, Inc.*, 396 F.2d 134 (5th C.A. 1968). The Court there concluded that the record before them was too incomplete to make such determinations.

A complete review of the history of this action, and the law of Georgia, however, leads to the conclusion that the plaintiff is legally and equitably entitled to interest.

It is uncontested that the contract had a lump sum price of $684,400.00 to which should be added $7,743.84, the value of uncontested change orders, for a total of $692,143.84. Defendant had, prior to suit, paid to plaintiff the sum of $612,551.49, leaving a balance of $79,592.35. Defendant then tendered to plaintiff a check for $77,646.58 which stated that it was to be in full payment for all remaining debts.

Erickson was under no obligation to accept defendant's tender as they had a valid claim for the larger amount and contested claims of additional value. It was not until almost four years later that defendant introduced any counterclaims that would offset the $79,592.35 figure, and all of these claims (totaling $536.15) were denied by the Master.

Thus, it is apparent that Erickson was put into the position of either forfeiting nearly $2,000.00 and all other claims, or lose the use of nearly $80,000 for some four years. Under these circumstances, the defendant could not fail to achieve an unreasonable advantage.

The law of Georgia provides for the award of prejudgment interest where the amount in question is liquidated, or of an amount certained and fixed. Ga. Code Ann. § 57-110, see also *First Nat'l. Bank of Atlanta* v. *State Highway Dept.*, 219 Ga. 144, 132 S.E.2d 263 (1963).

It is clear from the record that at all times the defendant owed to plaintiff the certain and fixed amount of $79,057.24. That amount represents the balance admittedly owed of $79,592.39 less all possible offsets alleged ($536.15). The award of interest by the Master on the $1,382.76 attributable to change order #42 was unwarranted as that separate claim, for work done on the existing building (not the new wing) was at least arguably in contention.

Even if this Court were to find that the amount in controversy was not "liquidated" (within the strictest interpretation of that term), the result herein would not differ. A reading of the applicable case law leads to the conclusion that Georgia courts would, under these circumstances, follow the generally accepted rule as set forth in *Aetna Casualty & Surety Co.* v. *U.S.*, 365 F.2d 997, 1006 (8th Cir., 1966), and *Michelsen* v. *Penney*, 135 F.2d 409 (2nd Cir., 1943).

> "Where the amount for which recovery is sought, even though not liquidated, is based upon the readily ascer-

tainable value of services or property, the general and better considered rule is to allow interest, at least in the absence of strong equities to the contrary."

See also *Fluor Corp.* v. *U.S. ex rel Mosher Steel Co.*, 405 F.2d 823 (9th Cir., 1969).

In the present case the "strong equities" indicate that interest should be awarded.

ORDER

AND NOW, to wit, this 28th day of April, 1971, it is ORDERED, ADJUDGED, and DECREED that the Master's report be modified to provide that:

1. Court costs and the Special Master's fees be equally shared by the parties;
2. the amount of principal on which interest is due from the 11th day of December, 1966 be reduced to $79,058.24 (at the rate of 7%);
3. all other findings of the Special Master are affirmed.

BY THE COURT,

THOMAS J. CLARY
United States Senior District Judge

[C] Judgment Dated May 16, 1971 and Entered on May 20, 1971 by Judge Thomas J. Clary of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION
FILE NO. 2073

ERICKSON'S, INC.,
Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant.

JUDGMENT

The Special Master having filed his Report on March 15, 1971, and the Court having heard from the Plaintiff on its Motion to Confirm the Report of the Special Master, and the Court having heard from the Defendant on its Motion for Modification of the Special Master's Report, and each of the aforesaid motions having received the consideration of this Court on both the law and the facts, and the Court having issued an Order on the 28th day of April, 1971, confirming in part and modifying in part the Report of the Special Master, which said Order has been filed for record in this Court and upon which the Judgment of this Court is based;

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that:

1. On Count One the Plaintiff, ERICKSON'S, INC., shall have judgment against the Defendant, TRAVELERS INDEMNITY COMPANY, for the full principal sum of $71,848.55, of which amount the sum of $71,312.40 shall bear interest at the legal rate of seven (7%) per cent per annum from December 11, 1966. The

remaining portion of the Count One principal sum shall bear interest from the date of this Judgment.

2. On Count Two the Plaintiff, ERICKSON'S, INC., shall have judgment against the Defendant, TRAVELERS INDEMNITY COMPANY, in the amount of $9,126.21, of which sum $7,743.84 shall bear interest at the legal rate of seven (7%) per cent per annum from December 11, 1966. The remaining portion of $1,387.37 shall bear interest from the date of this Judgment.

3. On Count Three judgment is for the defendant.

4. On Count Four judgment is for the Defendant.

5. On Count Five judgment is for the Defendant.

6. All Court costs and the fee of the Special Master shall be equally shared by the parties, and the Clerk of the Court is hereby expressly authorized, when said data is available to him, to insert below as a part of this Judgment, the sum of $..... as one-half of the Court costs, and the sum of $1,470.00 as one-half of the fee of the Special Master.

7. Except as set forth above, and where not inconsistent herewith, the Report of the Special Master dated March 15, 1971, is incorporated herein and is expressly made part of the judgment of the United States District Court.

Dated this 28th day of April, 1971.

BY THE COURT,

THOMAS J. CLARY
United States Senior District Judge

[D] Memorandum and Order dated July 26, 1971 and entered July 27, 1971 by Judge Thomas J. Clary of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CASE NO. 2073

ERICKSON'S, INC.

v.

THE TRAVELERS INDEMNITY COMPANY

MEMORANDUM AND ORDER

This matter has been reopened before this Court on defendant's motion to set aside the findings of fact and conclusions of law and the judgment entered thereon, and to grant a new trial and amend the findings of fact, conclusions of law and judgment thereon. To support their motions defendant questions the Court's findings of fact and its application of both law and equity.

This Court has again reviewed the record of the case, the Special Master's findings, the briefs of counsel and their arguments forwarded in the rehearing granted as a result of these motions. As a result of this review the Court can only find the counsel for the defendant has not brought forth any new evidence or authority which would cause this Court to amend its order of April 28, 1971.

The Court would, however, like to take this opportunity to further discuss its decision to split the fee of the Special Master equally.

On May 6, 1969 Judge Scarlett, in his order appointing the Special Master, directed that: "the compensation of the Special Master, his expenses and costs, shall be apportioned between the parties by the Special Master in accordance with his findings on the issues presented by counts Two, Three and Four of the Complaint."

It is clear that Judge Scarlett intended to place the financial burden on the party advancing the more unjust claims.

To assign one-third of the costs to the loser of each count would defeat that purpose as the amounts in controversy vary considerably between each count.

Further, defendant's insistance that count Five be included (a count added after May 6, 1969) strengthens the argument that the substance and not the form of the Order be looked to. Just as count Five arose subsequent to the Order in question, so did the controversy over interest on count One. This Court cannot take seriously, therefore, defendant's argument that count Five should be considered, but not the interest controversy concerning count One.

Considering the different apportionment methods advanced by the parties, defendant's share could arguably fall anywhere from 10-70%; the 70% figure being closer to the amount the Court would be inclined to find should it be forced into the complicated calculation the continually compounding interest and the value of the multiple claims comprising each count.

Finally, it appearing, in any event, that difference to the parties, between methods would not exceed $150, it would be just to order that they be divided equally.

Defendant's assignment of error No. Six, concerning the typographical error in the previous Order awarding 7.7% interest instead of 7.0% has been corrected by the Court and abandoned by the defendant.

ORDER

And now, to wit, this 26th day of July, 1971, it is ORDERED, ADJUDGED AND DECREED, that the defendant's motions requesting: 1) a new trial, 2) the setting aside of the findings of fact and conclusions of law and the judgment entered thereon, and 3) the amendment of said findings of fact, conclusions of law and judgment, be and hereby are DENIED.

BY THE COURT,
THOMAS J. CLARY
United States Senior District Judge

[E] Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit dated and Entered January 25, 1972

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2899
SUMMARY CALENDAR *

ERICKSON'S, INC.,
Plaintiff-Appellee,
v.
THE TRAVELERS INDEMNITY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

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(January 25, 1972)

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

PER CURIAM: We review on appeal [1] an award of damages by the lower court, based upon a Special Master's Report,

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* Rule 18, 5 Cir.; See *Isbell Enterprises, Inc.* v. *Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1] This Court dealt with an earlier attempted appeal by Travelers, see *The Travelers Indemnity Company* v. *Erickson's, Inc.*, 5 Cir. 1968, 396 F.2d 134, by dismissing the appeal, on the ground that it was improvidently taken from an order not final under Title 28, U.S.C., Section 1291 and not an appealable interlocutory order under Title 28, U.S.C., Section 1292 (a).

to Erickson's, Inc. (Erickson's), a plumbing, heating and air conditioning subcontractor of Peacock Construction Company (Peacock) against Travelers Indemnity Company (Travelers) on a Labor and Material Payment Bond furnished by Peacock for the use, protection and payment of subcontractors and persons supplying labor and materials on a project for a governmental body. The project was the erection by Peacock of a substantial addition to Glynn-Brunswick Memorial Hospital Authority (Owner), Brunswick, Georgia.

The questions raised on appeal concern: (a) the propriety of the allowance by the Special Master and the court of pre-judgment interest on a portion of the award on which interest was allowed, having been determined by the trial court to be certain in amount, capable of computation, admittedly owed and "liquidated"; and (b) the action of the trial court requiring that the expenses of the Special Master's fee be paid equally by the parties.

In neither particular has the appellant Travelers demonstrated error on the part of the trial court. The judgment is AFFIRMED.

[F] Order of February 24, 1972 Denying Petition for Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2899

ERICKSON'S, INC.,
Plaintiff, Appellee,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant-Appellant,

Appeal from the United States District Court for the Southern District of Georgia

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(February 24, 1972)

ON PETITION FOR REHEARING

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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(2) UNREPORTED DECISIONS FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, IN WHICH INTEREST WAS DISALLOWED UNDER THE SAME CIRCUMSTANCES PRESENTED BY THE CASE SUB JUDICE.

In two earlier cases, presenting the same issue as to whether prejudgment interest should be allowed, the Honorable Frank M. Scarlett, U.S. Senior District Judge for

the Southern District of Georgia, held that the special master erred in including prejudgment interest in his award. One of these cases, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, involved subcontract on the same construction project, the addition to the Glynn-Brunswick Hospital, Brunswick, Georgia, that is involved in the present case. The other case, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, arose out of a subcontract in connection with the construction of the Tift County Hospital. Copies of the judgments and special master's reports are set out below.

[A] Judgment of Judge F. M. Scarlett Entered November 1, 1968 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 790, U.S.D.C. S.D. Ga.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CIVIL ACTION NO. 790

MCCULLOUGH INDUSTRIES, INC.

v.

PEACOCK CONSTRUCTION COMPANY

JUDGMENT

The above matter came on for hearing before the Court on objections to the Master's findings filed by the defendant. Upon hearing, it appears from the record that the objections to the award of the Special Master should be dismissed in part and the award sustained in part.

It is therefore considered, ordered, and adjudged that the findings of the Master in favor of the plaintiff are hereby

sustained and judgment is hereby entered in behalf of the plaintiff in accordance with the award, save as to the item of interest accrued prior to the date of the award.

This the 1st day of November, 1968.

F. M. SCARLETT
United States Senior District Judge

[B] Report of the Special Master dated November 6, 1967 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 790, U.S.D.C. S.D. Ga.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CASE NO. 790

MCCULLOUGH INDUSTRIES, INC.
Plaintiff,

v.

PEACOCK CONSTRUCTION COMPANY
Defendant.

FINDINGS OF SPECIAL MASTER

The above stated case having been referred to me as Special Master, on November 1, 1966, by the Honorable F. M. Scarlett, Judge, United States District Court, Southern District of Georgia, to investigate, hear the evidence and render a judgment in the above stated matter, I hereby report the results of my investigation and findings as follows:

1. Investigation by the Special Master included a study of the entire record of the case, that is, the pleadings, transcript of testimony given before the Master in Savannah, Georgia on December 7, 1966, examination

of the exhibits introduced at the hearing and of depositions of witnesses taken subsequent to the hearing.

2. By agreement the parties hereto reserved their right to object to the admissability of evidence upon appeal to the Judge and the Special Master has no responsibility for ruling on admissability or relevance of evidence.

3. Defendant issued to Plaintiff a purchase order dated July 29, 1963, to supply cast stone required by Defendant in furtherance of his prime contract to construct a hospital. The purchase order called for delivery on or about December 15, 1963, but not later than 8 weeks after receipt of drawings prepared by the Plaintiff and submitted for approval to the Defendant and the Architect. The required approval was not obtained until February 5, 1964, thus fixing the delivery date as April 1, 1964. The responsibility for the long delay in approving the drawings must be borne equally by the parties; the Plaintiff for the poor quality of his presentation, and the Defendant and Architect for their cumbersome transmittal procedure and inexcusable delay in reviewing, commenting on and returning the drawings.

4. Plaintiff failed to make delivery on April 1, 1962. First shipment of the stone was made in May and delivery completed on August 5, 1964. On or about July 27, 1964, the parties finalized negotiations leading to a sub-contract dated July 14, 1964, wherein the Plaintiff agreed to accept the additional responsibility of erecting the stone he furnished under the terms of the purchase order. The sub-contract (Plaintiff's Exhibit "A") states in part, "This sub-contract includes, and therefore, supersedes Purchase Order 2352-37 issued by contractor (Defendant)." It further contains the usual admonitions; "Time is of the essence in

this sub-contract. Sub-contractor agrees to perform his work in accordance with Contractor's progress schedule." The fact that the sub-contract "supersedes" the purchase order limits the obligations of the parties to only those imposed by the sub-contract. The Defendant's allegation that the stone was late in arriving is not supported in light of the sub-contract. In fact most of the stone had been delivered before the new agreement was effected.

5. Plaintiff admitted that some of the stone failed to meet specification requirements and remedial work was necessary to make said stone acceptable. All corrective measures were made at Plaintiff's expense and the acceptability of the corrective measures is evidenced by the ultimate approval of the Architect and the Owner.

6. There remains only the question of timely erection of the stone by the Plaintiff. As of October 20, 1964, Plaintiff had put in place all but 76 small pieces of the total stone requirement, when by Defendant's action he was prevented from completing the balance of his obligation. On March 15, 1965, Defendant requested that the remaining work be accomplished. Plaintiff refused on grounds that he had not received payment for prior performance. Defendant completed remaining work of erection at a direct labor cost of $671.50 to which this Master had added the usual 25 per cent for overhead and profit; making a total of $840. Based on July 27, 1964, as the beginning date under the sub-contract and October 20, 1964, as completion date, the erection period covers 85 days. In the absence of evidence establishing a contract condition of less than 85 days, this Master considers said period of 85 days as timely performance, particularly in light of the magnitude of the project and the 720 day construction period permitted under the prime contract.

7. Defendant testified that he, as prime contractor, is responsible in the sum of $2,232.56 to a third party for charges incurred by Plaintiff in renting equipment and failing to make payment thereon.

8. The record reveals that Defendant received periodic payments from the Owner in the amount of 90 per cent of the value of the cast stone and labor of installing same, beginning with the May 1964 payment, but withheld from the Plaintiff reimbursement in like amount as required by agreement.

9. After hearing and considering the evidence, I find that the Plaintiff fulfilled his obligation under the sub-contract in that he provided acceptable material and installed same in a timely and adequate manner and is, therefore, entitled to payment in the claimed amount of $43,100 to which is to be added interest at 6 per cent per annum, as computed by this Master, for the period November 1964 to November 1967 on those monies due under the agreement, and amounting to $6,380.00 which were improperly withheld from the Plaintiff. The Defendant is, however, entitled to recover the sum of $840.00, the expense of erecting the balance of the stone, and the sum of $2,232.56 for equipment rental, a total of $3,072.56.

10. I, therefore, find in favor of the Plaintiff on the issue of fact, and against the Defendant in the principal sum of $46,617.44 together with future interest on said sum in the amount of 7 per cent per annum, all costs of court, including Master's compensation, and a reasonable fee, to be fixed by the Court, for the Plaintiff's Attorney.

11. The stenographic report of the evidence introduced before the Master along with the exhibit and other documentary evidence is attached hereto.

This 6th day of November 1967.

W. ZIMMERMAN
Special Master

[C] Judgment of Judge F. M. Scarlett Entered November 1, 1968 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 791, U.S.D.C. S.D. Ga.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CIVIL ACTION NO. 791

MCCULLOUGH INDUSTRIES, INC.

v.

PEACOCK CONSTRUCTION COMPANY

JUDGMENT

The above matter came on for hearing before the court on objections to the Master's findings filed by the defendant. Upon hearing, it appears from the record that the objections to the award of the Special Master should be dismissed in part and the award sustained in part.

It is therefore considered, ordered, and adjudged that the findings of the Master in favor of the plaintiff are hereby sustained and judgment is hereby entered in behalf of the plaintiff, in accordance with the award, save as to the item of interest accrued prior to the date of the award.

This the 1st day of November 1968.

F. M. SCARLETT
United States Judge

[D] Report of the Special Master dated November 6, 1967 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 791, U.S.D.C. S.D. Ga.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CASE NO. 791

MCCULLOUGH INDUSTRIES, INC.
Plaintiff,

v.

PEACOCK CONSTRUCTION COMPANY
Defendant.

FINDINGS OF SPECIAL MASTER

The above stated case having been referred to me as Special Master, on November 1, 1966, by the Honorable F. M. Scarlett, Judge, United States District Court, Southern District of Georgia, to investigate, hear the evidence and render a judgment in the above stated matter, I hereby report the results of my investigation and findings as follows:

1. Investigation by the Special Master included a study of the entire record of the case, that is, the pleadings, transcript of testimony given before the Master in Savannah, Georgia on December 7, 1966, examination of the exhibits introduced at that hearing and of depositions of witnesses taken subsequent to the hearing.

2. By agreement the parties hereto reserved their right to object to the admissibility of evidence upon appeal to the Judge and the Special Master has no responsibility for ruling on admissibility or relevance of evidence.

3. Plaintiff did in fact fulfill his obligation to fabricate and deliver the stone called for by a Purchase Order issued by the Defendant. The allegation by the Defendant that the stone was improperly fabricated and generally unacceptable as delivered is admitted by the Plaintiff's witnesses. However, in light of the successful effort by the Plaintiff, at his own expense, to remedy the admitted deficiencies of workmanship and material, is evidenced by ultimate acceptance by Architect and Owner and without penalty to the Defendant for tardy deliver of the facility, the matter of acceptability of quality is not of concern.

4. Defendant in his answer and counterclaim asserts that he was delayed for a period of 26 weeks in completing his contract to construct the Tift County Hospital by virtue of the Plaintiff's failure to make timely delivery of the stone as required by the terms of the Purchase Order. Submitted in evidence at the request of this Master is a "Schedule of Progress" for the Tift County Hospital prepared by the Defendant, and indicating thereupon the proposed schedule of progress and the actual schedule of progress. This record indicates that actual completion was accomplished 23 weeks after the proposed completion date. Further, the chart reveals that the project was actually behind schedule by 11 weeks at the time the proposed progress required that masonry and stone work commence. The schedule further establishes that the time actually required to complete the project after the masonry was finished exceeded the scheduled time by 2 weeks. Hence, of the 23 weeks of actual delay, 13 weeks were attributable to the Defendant's causes and 10 weeks to the Plaintiff's.

5. After hearing and considering the evidence, I find that the Plaintiff did in fact fulfill his obligation to provide the stone and is entitled to receive payment

in the claimed amount of $33,280.00 reduced by the sum of $17,150.00 representing additional expenses incurred by the Defendant due to Plaintiff's failure to make timely delivery as required by the purchase agreement.

6. I, therefore, find in favor of the Plaintiff on the issues of fact in the case and against the Defendant in the sum of $16,138.00 principal, together with future interest on said sum at the rate of seven per cent (7%) per annum, all costs of court, including Master's compensation payment, and a reasonable fee for the Plaintiff's attorney which is to be fixed by the Court.

7. The stenographic report of the evidence introduced before the Master along with the exhibits and other documentary evidence is attached hereto.

This 6th day of November 1967.

W. ZIMMERMAN
Special Master